

2009 DRAFTING REQUEST

Bill

Received: **12/18/2008**

Received By: **jkreye**

Wanted: **As time permits**

Identical to LRB:

For: **Administration-Budget**

By/Representing: **Lillethun**

This file may be shown to any legislator: **NO**

Drafter: **jkreye**

May Contact:

Addl. Drafters:

Subject: **Tax, Other - alcohol and tobacco**

Extra Copies:

Submit via email: **NO**

Pre Topic:

DOA:.....Lillethun, BB0300 -

Topic:

Direct marketing of cigarettes and tobacco products

Instructions:

See attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	jkreye 01/06/2009	bkraft 01/07/2009		_____			S&L Crime
/P1			phenry 01/07/2009	_____	lparisi 01/07/2009		S&L Crime
/P2	jkreye 01/21/2009	bkraft 01/22/2009	rschluet 01/22/2009	_____	sbasford 01/22/2009		S&L Crime
/P3	jkreye 01/26/2009	bkraft 01/26/2009	rschluet 01/26/2009	_____	sbasford 01/27/2009		S&L Crime
	jkreye 01/27/2009	bkraft 01/27/2009		_____			

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FE Sent For:

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1228

2007-09 Budget Bill Statutory Language Drafting Request

- Topic: Direct Marketing of Cigarettes and Tobacco Products
- Tracking Code: BB0300
- SBO team: Tax, Transportation and Budget Development Team
- SBO analyst: Chad Lillethun
 - Phone: 266-7597
 - Email: Chad.Lillethun@wisconsin.gov
- Agency acronym: DOR
- Agency number: 566
- Priority (Low, Medium, High): High

Intent:

Require direct marketers to obtain a direct marketing and sellers permit from DOR to sell cigarettes and tobacco products in Wisconsin.

**Legislative Proposal Summary
Wisconsin Department of Revenue
Income, Sales & Excise Tax Division**

DATE: November 24, 2008

TITLE: Direct Marketing of Cigarettes and Tobacco Products

DESCRIPTION OF CURRENT LAW AND PROBLEM

2005 Act 25 provided for cigarette sales to consumers in Wisconsin by direct marketing if the direct marketer fulfills certain requirements.

- Direct marketers must submit to the department their name, trade name, address of the person's principal place of business, phone number, e-mail address and Web site address.
- Direct marketers must certify to the department that they will acquire stamped cigarettes from a licensed distributor or unstamped cigarettes from the manufacturer, pay the tax imposed on all unstamped cigarettes, affix the stamps to the cigarette packages and sell only the stamped cigarettes in Wisconsin by direct marketing.
- Direct marketers must certify to the department that they will register with debit and credit card companies; that the invoices for all shipments will bear the direct marketers' name and address and any valid cigarette permit issued to the seller by DOR; direct marketers will provide DOR any information the DOR considers necessary to administer the law.
- Direct marketer may not sell any cigarettes to consumers in Wisconsin unless the sales tax, use tax, or cigarette tax has been paid on the sale of the cigarettes.
- Direct marketer must verify the consumer's name and address and that the consumer is at least 18 years of age and obtain a statement signed by the consumer at the time of purchase.
- Direct marketers who sell cigarettes by means of the Internet shall obtain the purchasers' e-mail address and receive payment by credit card, debit card, or check prior to shipping.
- Packages are to be clearly labeled "Cigarettes" on the outside of the packages.
- Persons receiving delivery must show a government issued identification card verifying that the person is at least 18 years old.

Act 25 does not give DOR any enforcement authority over direct marketers to ensure they are complying with the requirements of the law.

Act 25 retained requirement that direct marketers be licensed by municipalities rather than the State of Wisconsin.

RECOMMENDATION FOR ACTION

- Require direct marketers to obtain a direct marketing permit from DOR to sell cigarettes and tobacco products in Wisconsin with certain requirements already in Act 25.
- Require direct marketers obtain a Wisconsin seller's permit.
- Remove the requirement that direct marketers obtain a municipal retailer license.
- Provide for penalties for noncompliance.
- Provide for authority for Secretary of Revenue to waive penalties under certain circumstances.
- Preclude persons convicted of a felony from obtaining a direct marketing permit.
- Apply all provisions tobacco products in addition to cigarettes.

ADMINISTRATIVE IMPACT

Administrative impact is minimal.

FAIRNESS/TAX EQUITY

Changes in the law will ensure a level-playing field between retailers, distributors, manufacturers and direct marketers.

FISCAL EFFECT

Fiscal impact is minimal.

SUMMARY OF RECOMMENDED CHANGES

- Eliminate requirement that direct marketers obtain a municipal retailer license in s. 134.65(1)
- Add language to require direct marketers to obtain a direct marketing permit from DOR to direct market cigarettes and tobacco products in Wisconsin with language regarding who may not obtain a permit.
- Amend s. 134.65(5) to increase fines from \$25 - \$200 for the first violation to \$500 - \$1,000; and from \$25 - \$300 for 2nd or subsequent offense to \$1,000 to \$5,000.
- Create authority for Secretary of Revenue to waive penalties under certain circumstances
- Add requirement that direct marketers obtain a seller's permit
- Do various clean-up of language in the existing law as follows:
 - 139.44(1m) change cigarette meter to cigarette tax impression machine
 - 139.75 to 139.83 change he or she to the person
 - 139.75(4) add in this state after "Any person" and delete the same phrase after "tobacco products".
 - 139.75(7) add "by a retailer."
 - 139.75(8) change "Retailer" to has the meaning given in s. 134.66(1)(g).
 - 139.79 Add to title, Permits "required. Delete "distributor; subjobber".
 - 139.79(1) add "direct marketer" after distributor.
 - 139.79(2) change 139.34(1)(b) to (1)(c).
 - 139.81(1) delete "or take orders for"; add "or solicit sales of" tobacco products. Delete "for any manufacturer or permittee".
 - 139.81(2) Change 139.34(1)(b) to (1)(c).

EFFECTIVE DATE AN/OR INITIAL APPLICABILITY

Effective on date of publication.

DOR CONTACT PERSON

Diane Hardt
266-6798

PREPARED BY

Lili Crane

Bulletin
DOA:.....Easton, BB0153 - Direct marketing of cigarettes and tobacco
products *BB0300*

FOR 2007-09 BUDGET -- NOT READY FOR INTRODUCTION

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do not gen.
1 AN ACT ...; relating to: the budget.

Analysis by the Legislative Reference Bureau

TAXATION

OTHER TAXATION

Under current law, generally, a person may not sell cigarettes in this state as a distributor, jobber, vending machine operator, or multiple retailer without having a permit from DOR. A "jobber" is any person who acquires cigarettes from manufacturers or distributors, stores the cigarettes, and sells the cigarettes to retailers for resale.

Current law also prohibits a direct marketer from selling cigarettes to consumers in this state unless the direct marketer fulfills certain requirements. Current law defines "direct marketing" as publishing or making accessible an offer for the sale of cigarettes to consumers in this state, or selling cigarettes, using any means by which the consumer is not physically present on a premise that sells cigarettes.

Under current law, a direct marketer must certify to DOR: that the person will register with debit and credit card companies; that the invoices for all shipments of cigarettes will bear the direct marketer's name and address; and that the direct marketer will provide DOR any information that DOR considers necessary. The direct marketer may not sell any cigarettes unless the sales tax, use tax, or cigarette tax, as appropriate, has been paid on the sale of the cigarettes.

Current law requires a direct marketer who sells cigarettes to consumers in this state to verify the consumer's name and address and that the consumer is at least 18 years of age. In addition, any person who delivers such cigarettes to consumers in this state must verify that the person who purchased the cigarettes, and who receives the delivery, is at least 18 years of age.

Under this bill, generally, the same provisions under current law that apply to the direct marketing of cigarettes also apply to the direct marketing of tobacco products. In addition, no person may sell cigarettes or tobacco products to consumers in this state unless the person applies to DOR for a permit.

Under current law, a person may not sell cigarettes or tobacco products to consumers in this state unless the person obtains a license from each city, village, or town in which the person intends to sell cigarettes or tobacco products. Under the bill, no city, village, or town may issue a license to any person who has an arrest or conviction record related to selling cigarettes or tobacco products. Under the bill, a direct marketer who holds a valid permit to sell cigarettes or tobacco products to consumers in this state is not required to obtain a license from each city, village, or town in which the cigarettes or tobacco products are sold.

Because this bill creates a new crime or revises a penalty for an existing crime, the Joint Review Committee on Criminal Penalties may be requested to prepare a report concerning the proposed penalty and the costs or savings that are likely to result if the bill is enacted.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

X
1 **SECTION 1.** 77.61 (11) of the statutes is amended to read:

2 77.61 **(11)** Any city, village or town clerk or other official whose duty it is to issue
3 licenses or permits to engage in a business involving the sale at retail of tangible
4 personal property subject to tax under this subchapter, or the furnishing of services
5 so subject to tax, shall, before issuing such license or permit, require proof that the
6 person to whom such license or permit is to be issued is the holder of a seller's permit
7 ~~as required by~~ or is registered to collect, report, and remit use tax under this
8 subchapter or has been informed by an employee of the department that the
9 department will issue a seller's permit to that person or register that person to
10 collect, report, and remit use tax.

X
1 **SECTION 2.** 100.20 (1n) of the statutes is amended to read:

2 **100.20 (1n)** It is an unfair method of competition or an unfair trade practice
3 for any person to sell cigarettes to consumers in this state in violation of s. 139.345
4 or to sell tobacco products to consumers in this state in violation of s. 139.795.

X
5 **SECTION 3.** 100.30 (2) (c) 1. b. of the statutes is amended to read:

6 **100.30 (2) (c) 1. b.** For every person holding a permit as a bonded direct
7 marketer as defined in s. 139.30 (1d), as a distributor as defined in s. 139.30 (3), or
8 as a multiple retailer as defined in s. 139.30 (8), with respect to that portion of the
9 person's business which involves the purchase and sale of cigarettes "cost to
10 wholesaler" means the cost charged by the cigarette manufacturer, disregarding any
11 manufacturer's discount or any discount under s. 139.32 (5), plus the amount of tax
12 imposed under s. 139.31. Except for a sale at wholesale between wholesalers, a
13 markup to cover a proportionate part of the cost of doing business shall be added to
14 the cost to wholesaler. In the absence of proof of a lesser cost, this markup shall be
15 3% of the cost to wholesaler as set forth in this subd. 1. b.

X
16 **SECTION 4.** 100.30 (2) (L) (intro.) of the statutes is amended to read:

17 **100.30 (2) (L) (intro.)** "Wholesaler" includes every person holding a permit as
18 a bonded direct marketer as defined in s. 139.30 (1d) or as a multiple retailer under
19 s. 139.30 (8) and every person engaged in the business of making sales at wholesale,
20 other than sales of motor vehicle fuel at wholesale, within this state except as follows:

X
21 **SECTION 5.** 100.30 (2) (L) 2. of the statutes is amended to read:

22 **100.30 (2) (L) 2.** In the case of a person holding a permit as a bonded direct
23 marketer as defined in s. 139.30 (1d) or as a multiple retailer as defined in s. 139.30
24 (8), "wholesaler" applies to that portion of the person's business involving the

1 purchase and sale of cigarettes and to any wholesale portion of that person's
2 business.

3 **SECTION 6.** 134.65 (1) of the statutes is amended to read:

4 134.65 (1) No person shall in any manner, or upon any pretense, or by any
5 device, directly or indirectly sell, expose for sale, possess with intent to sell,
6 exchange, barter, dispose of or give away any cigarettes or tobacco products to any
7 person not holding a license as herein provided or a permit under ss. 139.30 to 139.41
8 ~~or, 139.79, or 139.795~~ without first obtaining a license from the clerk of the city,
9 village, or town wherein such privilege is sought to be exercised. This subsection
10 does not apply to a person who holds a valid permit under s. 139.345 or 139.795 and
11 who sells cigarettes or tobacco products solely as a direct marketer.

12 **SECTION 7.** 134.65 (1n) of the statutes is created to read:

13 134.65 (1n) (a) The department of revenue shall prepare an application form
14 for licenses issued under this section. In addition to the information required under
15 sub. (1m), the form shall require all of the following information:

16 1. The applicant's history relevant to the applicant's fitness to hold a license
17 under this section.

18 2. The kind of license for which the applicant is applying.

19 3. The premises where cigarettes or tobacco products will be sold or stored.

20 4. If the applicant is a corporation, the identity of the corporate officers and
21 agent.

22 5. If the applicant is a limited liability company, the identity of the company
23 members or managers and agent.

24 6. The applicant's trade name, if any.

25 7. Any other information required by the department.

(b) The department of revenue shall provide one copy of the application form prepared under this subsection to each city, village, and town.

(c) Each applicant for a license under this section shall use the application form prepared under this subsection.

(d) 1. Each application for a license under this section shall be sworn to by the applicant and the applicant shall submit the application with the clerk of the city, village, or town where the intended place of sale is located.

2. Within 10 days of any change in any fact set forth in an application, the applicant or license holder shall file a written description of the change with the clerk of the city, village, or town where the application was submitted.

3. Any person may inspect applications submitted under this paragraph. The clerk of each city, village, or town where such applications are submitted shall retain all applications submitted under this paragraph, but may destroy all applications that have been retained for 4 years or longer.

SECTION 8. 134.65 (1r) of the statutes is created to read:

134.65 (1r) (a) Subject to ss. 111.321, 111.322, and 111.335, no license under sub. (1) may be issued to any person to whom any of the following applies:

1. The person has an arrest record or a conviction record.

2. The person has been convicted of a felony, or as a repeat or habitual offender, unless pardoned.

3. The person has not submitted proof as provided under s. 77.61 (11).

4. The person is not 18 years of age or older.

(b) The requirements under par. (a) apply to all partners of a partnership, all members of limited liability company, all agents of a limited liability company or corporation, and all officers of a corporation. Subject to ss. 111.321, 111.322, and

1 111.335, if a business entity has been convicted of a crime, the entity may not be
2 issued a license under sub. (1) unless the entity has terminated its relationship with
3 the individuals whose actions directly contributed to the conviction.

4 ~~X~~
SECTION 9. 134.65 (2) (a) of the statutes is amended to read:

5 134.65 (2) (a) ~~Except~~ Subject to sub. (1r). and ~~except~~ as provided in par. (b),
6 upon filing of a proper written application a license shall be issued on July 1 of each
7 year or when applied for and continue in force until the following June 30 unless
8 sooner revoked. The city, village or town may charge a fee for the license of not less
9 than \$5 nor more than \$100 per year which shall be paid to the city, village or town
10 treasurer before the license is issued.

11 ~~X~~
SECTION 10. 134.65 (5) of the statutes is renumbered 134.65 (5) (a) and
12 amended to read:

13 134.65 (5) (a) ~~Any~~ Except as provided in par. (b). ~~any~~ person violating this
14 section shall be fined not more than \$100 \$1,000 nor less than \$25 \$500 for the first
15 offense and shall be fined not more than \$200 \$5,000 nor less than \$25 \$1,000 or
16 imprisoned for not more than 180 days or both for the 2nd or subsequent offense. If
17 ~~upon such 2nd or subsequent violation, the person so violating this section was~~
18 ~~personally guilty of a failure to exercise due care to prevent violation thereof, the~~
19 ~~person shall be fined not more than \$300 nor less than \$25 or imprisoned not~~
20 ~~exceeding 60 days or both.~~ Conviction Upon conviction of a 2nd or subsequent
21 offense, the court shall immediately terminate the license of the person convicted of
22 ~~being personally guilty of such failure to exercise due care and the person shall not~~
23 ~~be entitled to another license hereunder for a period of 5 years thereafter, nor shall~~
24 ~~the person in that period act as the servant or agent of a person licensed hereunder~~
25 ~~for the performance of the acts authorized by such license.~~

X
1 **SECTION 11.** 134.65 (5) (b) of the statutes is created to read:

2 134.65 **(5)** (b) No penalty shall be imposed under par. (a) if any of the following
3 apply:

4 1. The secretary of revenue determines that imposing a penalty would be
5 inequitable because of inadvertent acts, mistakes, or unusual circumstances related
6 to the violation.

7 2. The person who is subject to a penalty under par. (a) had good cause to violate
8 this section, and such violation did not result from the person's neglect.

X
9 **SECTION 12.** 134.66 (2) (d) of the statutes is created to read:

10 134.66 **(2)** (d) No retailer, direct marketer, manufacturer, distributor, jobber or
11 subjobber, no agent, employee or independent contractor of a retailer, direct
12 marketer, manufacturer, distributor, jobber or subjobber, and no agent or employee
13 of an independent contractor may provide cigarettes or tobacco products for nominal
14 or no consideration to any person under the age of 18.

X
15 **SECTION 13.** 134.66 (3m) of the statutes is created to read:

16 134.66 **(3m)** DEFENSE OF DIRECT MARKETER. Proof of all of the following facts by
17 a direct marketer who sells cigarettes or tobacco products to a person under the age
18 of 18 is a defense to any prosecution for a violation under sub. (2) (a):

19 (a) That the direct marketer used a mechanism, approved by the department
20 of revenue, for verifying the age of the purchaser.

21 (b) That the purchaser falsely represented that he or she had attained the age
22 of 18 and presented a copy or facsimile of an identification card.

23 (c) That the name and birthdate of the purchaser, as indicated by the purchaser,
24 matched the name and birthdate on the identification presented under par. (b).

1 (d) That the sale was made in good faith, in reasonable reliance on the
2 mechanism described in par. (a) and the representation and identification under
3 pars. (b) and (c), and in the belief that the purchaser had attained the age of 18.

4 **SECTION 14.** 139.30 (4n) of the statutes is repealed and recreated to read:

5 139.30 (4n) "Identification card" has the meaning given in s. 134.66 (1) (c).

6 **SECTION 15.** 139.30 (7) of the statutes is amended to read:

7 139.30 (7) "Manufacturer" means any person who directly manufactures
8 cigarettes for the purpose of sale, including the authorized agent of a person who
9 directly manufactures cigarettes for the purpose of sale.

10 **SECTION 16.** 139.30 (8s) of the statutes is created to read:

11 139.30 (8s) "Person" means any individual, sole proprietorship, partnership,
12 limited liability company, corporation, or association, or any owner of a single-owner
13 entity that is disregarded as a separate entity under ch. 71.

14 **SECTION 17.** 139.32 (4) of the statutes is amended to read:

15 139.32 (4) In lieu of stamps the secretary may authorize impressions applied
16 by the use of ~~meter~~ machines. The secretary shall prescribe by rule the type of
17 impression and the kind of machines which may be used.

18 **SECTION 18.** 139.321 (1) (intro.) of the statutes is amended to read:

19 139.321 (1) (intro.) It is unlawful for any person to purchase or possess
20 cigarettes unless the required stamps are properly affixed as provided in ss. 139.32
21 (1) and 139.33 (4).

22 **SECTION 19.** 139.321 (1) (a) 1. of the statutes is amended to read:

23 139.321 (1) (a) 1. Manufacturers, bonded direct marketers, distributors or
24 warehouse operators possessing valid permits issued by the secretary.

25 **SECTION 20.** 139.34 (1) (a) of the statutes is amended to read:

1 139.34 (1) (a) No person may manufacture cigarettes in this state or sell
2 cigarettes in this state as a distributor, manufacturer, jobber, vending machine
3 operator, direct marketer, or multiple retailer and no person may operate a
4 warehouse in this state for the storage of cigarettes for another person without first
5 filing an application for and obtaining the proper permit to perform such operations
6 from the department.

7 **SECTION 21.** 139.34 (1) (b) of the statutes is repealed.

8 **SECTION 22.** 139.34 (1) (c) 1. of the statutes is repealed.

9 **SECTION 23.** 139.34 (1) (c) 1m. of the statutes is created to read:

10 139.34 (1) (c) 1m. The person has an arrest record or a conviction record.

11 **SECTION 24.** 139.34 (1) (c) 2. of the statutes is amended to read:

12 139.34 (1) (c) 2. The person has been convicted of a felony, or as a repeat or
13 habitual offender, unless pardoned.

14 **SECTION 25.** 139.34 (1) (c) 3. of the statutes is repealed.

15 **SECTION 26.** 139.34 (1) (c) 4. of the statutes is repealed.

16 **SECTION 27.** 139.34 (1) (c) 4m. of the statutes is created to read:

17 139.34 (1) (c) 4m. The person is not 18 years of age or older.

18 **SECTION 28.** 139.34 (1) (c) 5. of the statutes is repealed.

19 **SECTION 29.** 139.34 (1) (c) 6. of the statutes is repealed.

20 **SECTION 30.** 139.34 (1) (c) 7. of the statutes is renumbered 139.34 (1) (c) 5m.

21 **SECTION 31.** 139.34 (1) (cm) of the statutes is created to read:

22 139.34 (1) (cm) The requirements under par. (c) apply to all partners of a
23 partnership, all members of a limited liability company, all agents of a limited
24 liability company or corporation, and all officers of a corporation.

25 **SECTION 32.** 139.34 (4) of the statutes is amended to read:

1 139.34 (4) A separate permit shall be required of and issued to each class of
2 permittee and the holder of any permit shall perform only the operations thereby
3 authorized. Such permit shall not be transferable from one person to another or from
4 one premises to another. A separate permit shall be required for each place where
5 cigarettes are stamped or where cigarettes are stored for sale at wholesale or,
6 through vending machines or multiple retail outlets, or by direct marketing.

7 ^X
SECTION 33. 139.34 (6) of the statutes is amended to read:

8 139.34 (6) A vending machine operator or a multiple retailer may acquire
9 unstamped cigarettes from the manufacturers thereof and affix the stamps to
10 packages or other containers only if the vending machine operator or multiple
11 retailer also holds a permit as a distributor or bonded direct marketer.

12 ^X
SECTION 34. 139.34 (8) of the statutes is amended to read:

13 139.34 (8) The holder of a warehouse permit is entitled to store cigarettes on
14 the premises described in the permit. The warehouse permit shall not authorize the
15 holder to sell cigarettes. Unstamped cigarettes stored in a warehouse for a
16 manufacturer, bonded direct marketer, or distributor may be delivered only to a
17 person holding a permit as a manufacturer or, distributor, or bonded direct marketer
18 who is authorized by the department to purchase and affix tax stamps.

19 ^X
SECTION 35. 139.345 (1) (a) of the statutes is amended to read:

20 139.345 (1) (a) No person may sell cigarettes to consumers in this state as a
21 direct marketer or solicit sales of cigarettes to consumers in this state by direct
22 marketing unless the person ~~submits to~~ has obtained a permit from the department
23 ~~the person's name, trade name, address of the person's principal place of business,~~
24 ~~phone number, e-mail address, and Web site address~~ to make such sales or

1 solicitations. The person shall file an application for a permit under this subsection
2 with the department, in the manner prescribed by the department.

3 **SECTION 36.** 139.345 (1) (b) of the statutes is amended to read:

4 139.345 (1) (b) ~~No person may sell cigarettes as described under this section~~
5 The department may not issue a permit to a person under par. (a) unless the person
6 certifies to the department, in the manner prescribed by the department, that the
7 person shall acquire stamped cigarettes from a licensed distributor or unstamped
8 cigarettes from the manufacturer thereof, pay the tax imposed under this subchapter
9 on all unstamped cigarettes and affix stamps to the cigarette packages or containers
10 as provided under s. 139.32 (1), store such packages or containers, and sell only such
11 packages or containers to consumers in this state by direct marketing; or acquire
12 cigarettes from a distributor, to the packages or containers of which stamps have
13 been affixed as provided under s. 139.32 (1), and sell only such packages or
14 containers to consumers in this state by direct marketing.

15 **SECTION 37.** 139.345 (1) (d) of the statutes is amended to read:

16 139.345 (1) (d) ~~No person may sell cigarettes as described in this section~~ The
17 department may not issue a permit to a person under par. (a) unless the person
18 certifies to the department, in the manner prescribed by the department, that the
19 person shall register with credit card and debit card companies; that the invoices and
20 all means of solicitation for all shipments of cigarette sales from the person shall bear
21 the person's name and address and the permit number of the permit ultimately
22 issued under this subsection; and that the person shall provide the department any
23 information the department considers necessary to administer this section.

24 **SECTION 38.** 139.345 (3) (intro.) of the statutes is amended to read:

1 139.345 (3) (intro.) No person may sell cigarettes to ~~consumers~~ a consumer in
2 this state unless the person does all of the following:

3 ~~X~~
SECTION 39. 139.345 (3) (a) (intro.) of the statutes is amended to read:

4 139.345 (3) (a) (intro.) Verifies the consumer's name identity and address and
5 that the consumer is at least 18 years of age by any of the following methods:

6 ~~X~~
SECTION 40. 139.345 (3) (a) 2. of the statutes is amended to read:

7 139.345 (3) (a) 2. The person receives from the consumer, at the time of
8 purchase, a copy of ~~a government issued~~ an identification card and verifies that the
9 name specified on the identification card matches the name of the consumer and that
10 the birth date on the identification card indicates that the consumer is at least 18
11 years of age.

12 ~~X~~
SECTION 41. 139.345 (7) (a) of the statutes is amended to read:

13 139.345 (7) (a) No person may deliver a package of cigarettes sold by direct
14 marketing to a consumer in this state unless the person making the delivery receives
15 ~~a government issued~~ an identification card from the person receiving the package
16 and verifies that the person receiving the package is at least 18 years of age. If the
17 person receiving the package is not the person to whom the package is addressed, the
18 person delivering the package shall have the person receiving the package sign a
19 statement that affirms that the person to whom the package is addressed is at least
20 18 years of age.

21 ~~X~~
SECTION 42. 139.345 (8) of the statutes is created to read:

22 139.345 (8) (a) No person may sell cigarettes to consumers in this state by direct
23 marketing unless the tax imposed under s. 139.31 (1) is paid on the cigarettes and
24 stamps are affixed to the cigarette packages or containers as provided under s.
25 139.32.

1 (b) No person may sell cigarettes to consumers in this state by direct marketing
2 unless the cigarette brands are approved by the department and listed in the
3 directory of certified tobacco product manufacturers and brands as provided under
4 s. 995.12 (2) (b).

5 **SECTION 43.** 139.345 (9) of the statutes is created to read:

6 139.345 (9) Except as provided in sub. (12), any person who, without having
7 a valid permit under sub. (1), sells or solicits sales of cigarettes to consumers in this
8 state by direct marketing shall pay a penalty to the department of \$5,000 or an
9 amount that is equal to \$50 for every 200 cigarettes, or fraction of 200 cigarettes, sold
10 to consumers in this state by direct marketing, whichever is greater.

11 **SECTION 44.** 139.345 (10) of the statutes is created to read:

12 139.345 (10) (a) No sale of cigarettes to a consumer in this state by direct
13 marketing may exceed 10 cartons for each invoice or 20 cartons in a 30-day period
14 for each purchaser or address.

15 (b) Except as provided in sub. (12), any person who sells cigarettes in an amount
16 that exceeds the amounts allowed under par. (a) shall pay a penalty to the
17 department of \$5,000 or an amount that is equal to \$50 for every 200 cigarettes, or
18 fraction of 200 cigarettes, sold in excess of the amounts allowed under par. (a),
19 whichever is greater.

20 (c) Except as provided in sub. (12), any person who purchases cigarettes in an
21 amount that exceeds the amounts allowed under par. (a) shall apply for a permit
22 under s. 139.34 and shall pay a penalty to the department of \$25 for every 200
23 cigarettes, or fraction of 200 cigarettes, purchased in excess of the amounts allowed
24 under par. (a).

25 **SECTION 45.** 139.345 (11) of the statutes is created to read:

1 139.345 (11) (a) Any nonresident or foreign direct marketer that has not
2 registered to do business in this state as a foreign corporation or business entity
3 shall, as a condition precedent to obtaining a permit under s. 139.34 (1), appoint and
4 continually engage the services of an agent in this state to act as agent for the service
5 of process on whom all processes, and any action or proceeding against it concerning
6 or arising out of the enforcement of this chapter, may be served in any manner
7 authorized by law. That service shall constitute legal and valid service of process on
8 the direct marketer. The direct marketer shall provide the name, address, phone
9 number, and proof of the appointment and availability of the agent to the
10 department.

11 (b) A direct marketer described under par. (a) shall provide notice to the
12 department no later than 30 calendar days before termination of the authority of an
13 agent under par. (a) and shall provide proof to the satisfaction of the department of
14 the appointment of a new agent no later than 5 calendar days before the termination
15 of an existing appointment. In the event an agent terminates an appointment, the
16 direct marketer shall notify the department of that termination no later than 5
17 calendar days after the termination and shall include proof to the satisfaction of the
18 department of the appointment of a new agent.

19 (c) The secretary of state is the agent in this state for the service of process of
20 any direct marketer who has not appointed and engaged an agent as provided under
21 par. (a), except that the secretary of state acting as the direct marketer's agent for
22 the service of process does not satisfy the requirements imposed by par. (a).

23 **SECTION 46.** 139.345 (12) of the statutes is created to read:

24 139.345 (12) No penalty shall be imposed under subs. (9) and (10) if any of the
25 following apply:

1 (a) The secretary of revenue determines that imposing a penalty would be
2 inequitable because of inadvertent acts, mistakes, or unusual circumstances related
3 to the violation.

4 (b) The person who is subject to a penalty under sub. (9) or (10) had good cause
5 to violate sub. (9) or (10), and such violation did not result from the person's neglect.

6 ^X
SECTION 47. 139.37 (1) (a) of the statutes is amended to read:

7 139.37 (1) (a) No person shall sell cigarettes or take orders for cigarettes for
8 resale solicit cigarette sales in this state for any manufacturer or permittee without
9 first obtaining a unless the person has filed an application for and obtained a valid
10 certificate under s. 73.03 (50) and a salesperson's permit from the department of
11 revenue. No manufacturer or permittee shall authorize any person to sell cigarettes
12 or take orders for cigarettes solicit cigarette sales in this state without first having
13 such person secure unless the person has filed an application for and obtained a valid
14 certificate under s. 73.03 (50) and a salesperson's permit. No person shall authorize
15 the sale of cigarettes or the solicitation of cigarette sales in this state unless the
16 person has filed an application for and obtained a valid certificate under s. 73.03 (50)
17 and a valid permit under s. 139.34. ^A The department shall issue the required number
18 of permits to manufacturers and permittees who hold a valid certificate issued under
19 s. 73.03 (50). Each application for a salesperson's permit shall disclose the name and
20 address of the employer or the person for whom the salesperson is selling or soliciting
21 and such permit shall remain effective only while the salesperson represents such
22 named employer or person. If such salesperson is thereafter employed by another
23 manufacturer or permittee person, the salesperson shall obtain a new salesperson's
24 permit. ~~Each manufacturer and permittee~~ The employer of any such salesperson

1 shall notify the department within 10 days after the resignation or dismissal of any
2 such the salesperson holding a permit.

3 **SECTION 48.** ^X 139.40 (1) of the statutes is amended to read:

4 139.40 (1) All cigarettes acquired, owned, imported, possessed, kept, stored,
5 made, sold, distributed or transported in violation of this chapter or s. 134.65, and
6 all personal property used in connection therewith is unlawful property and subject
7 to seizure by the secretary or any peace officer. All cigarettes seized for violating s.
8 139.31 (4) or (5) shall be destroyed.

9 **SECTION 49.** ^X 139.40 (2) of the statutes is amended to read:

10 139.40 (2) If cigarettes which do not bear the proper tax stamps or on which
11 ~~the tax has not been paid~~ Cigarettes that are so seized they as provided under sub.
12 (1) may be given to law enforcement officers to use in criminal investigations or sold
13 to qualified buyers by the secretary, without notice. If the cigarettes are sold, after
14 deducting the costs of the sale and the keeping of storing the property, the proceeds
15 of the sale shall be paid into the state treasury. If the secretary finds that such
16 cigarettes may deteriorate or become unfit for use in criminal investigations or for
17 sale or that those uses would otherwise be impractical, the secretary may order them
18 destroyed or give them to a charitable or penal institution for free distribution to
19 patients or inmates.

20 **SECTION 50.** ^X 139.44 (1m) of the statutes is amended to read:

21 139.44 (1m) Any person who falsely or fraudulently tampers with a cigarette
22 meter tax impression machine in order to evade the tax under s. 139.31 is guilty of
23 a Class G felony.

24 **SECTION 51.** ^X 139.44 (2) of the statutes is amended to read:

1 139.44 (2) Any person who makes or signs any false or fraudulent report or who
2 attempts to evade the tax imposed by s. 139.31 or 139.76, or who aids in or abets the
3 evasion or attempted evasion of that tax ~~may be fined not more than \$10,000 or~~
4 ~~imprisoned for not more than 9 months or both, is guilty of a Class H felony.~~

5 **SECTION 52.** 139.44 (3) of the statutes is amended to read:

6 139.44 (3) Any permittee or licensee who fails to keep the records required by
7 ss. 139.30 to 139.42 or 139.77 to 139.82 shall be fined not less than \$100 \$500 nor
8 more than ~~\$500~~ \$1,000 for the first offense and shall be fined not less than \$1,000
9 nor more than \$5,000 or imprisoned not more than ~~6 months~~ 180 days or both for a
10 2nd or subsequent offense.

11 **SECTION 53.** 139.44 (4) of the statutes is amended to read:

12 139.44 (4) Any person who refuses to permit the examination or inspection
13 authorized in s. 139.39 (2) or 139.83 may be fined not ~~more~~ less than \$500 nor more
14 than \$1,000 or imprisoned not more than ~~90~~ 180 days or both. Such refusal shall be
15 cause for immediate ~~suspension or~~ revocation of permit or license by the secretary.

16 **SECTION 54.** 139.44 (5) of the statutes is amended to read:

17 139.44 (5) Any person who violates any of the provisions of ss. 139.30 to 139.41
18 or 139.75 to 139.83 for which no other penalty is prescribed shall be fined not less
19 than ~~\$100 nor more than \$1,000~~ \$10,000 or imprisoned not less than ~~10 days nor~~
20 more than ~~90 days~~ 9 months or both.

21 **SECTION 55.** 139.44 (6) of the statutes is amended to read:

22 139.44 (6) Any person who violates any of the rules of the department shall be
23 fined not less than \$100 \$500 nor more than \$500 \$1,000 or be imprisoned not more
24 than ~~6~~ 9 months or both.

25 **SECTION 56.** 139.44 (6m) of the statutes is created to read:

1 139.44 (6m) Any person who manufactures or sells cigarettes in this state
2 without holding the proper permit issued under this subchapter is guilty of a Class
3 I felony.

4 SECTION 57. 139.44 (7) of the statutes is amended to read:

5 139.44 (7) In addition to the penalties imposed for violation of ss. 139.30 to
6 139.41 or 139.75 to 139.83 or any of the rules of the department, the permit of any
7 person convicted of a 2nd or subsequent offense shall be automatically revoked and
8 ~~he or she~~ the person shall not be granted another permit for a period of 2 5 years
9 following such revocation.

10 SECTION 58. 139.44 (13) of the statutes is created to read:

11 139.44 (13) Notwithstanding subs. (1) to (8), no penalty shall be imposed under
12 subs. (1) to (8) if any of the following apply:

13 ^{e(a)}
14 (1) The secretary of revenue determines that imposing a penalty would be
15 inequitable because of inadvertent acts, mistakes, or unusual circumstances related
16 to the violation.

17 ^{e(b)}
18 (2) The person who is subject to a penalty under subs. (1) to (8) had good cause
19 to commit the violation to which the penalty applies, and such violation did not result
20 from the person's neglect.

21 SECTION 59. 139.75 (2) of the statutes is amended to read:

22 139.75 (2) "Consumer" means any individual who receives tobacco products for
23 his or her personal use or consumption or any person individual who has title to or
24 possession of tobacco products ~~in storage for use or other consumption in this state~~
any purpose other than for sale or resale.

SECTION 60. 139.75 (3g) of the statutes is created to read:

1 139.75 **(3g)** “Direct marketer” means any person who solicits sales of or sells
2 tobacco products to consumers in this state by direct marketing.

3 **SECTION 61.** 139.75 (3r) of the statutes is created to read:

4 139.75 **(3r)** “Direct marketing” means publishing or making accessible an offer
5 for the sale of tobacco products to consumers in this state, or selling tobacco products
6 to consumers in this state, using any means by which the consumer is not physically
7 present on a premise that sells tobacco products.

8 **SECTION 62.** 139.75 (4) (a) of the statutes is amended to read:

9 139.75 **(4)** (a) Any person in this state engaged in the business of selling tobacco
10 products ~~in this state~~ who brings, or causes to be brought, into this state from outside
11 the state any tobacco products for sale;

12 **SECTION 63.** 139.75 (4) (c) of the statutes is amended to read:

13 139.75 **(4)** (c) Any person outside this state engaged in the business of selling
14 tobacco products ~~outside this state~~ who ships or transports tobacco products to
15 retailers in this state to be sold by those retailers.

16 **SECTION 64.** 139.75 (4) (cm) of the statutes is created to read:

17 139.75 **(4)** (cm) Any person outside this state engaged in the business of selling
18 tobacco products who ships or transports tobacco products to consumers in this state.

19 **SECTION 65.** 139.75 (4n) of the statutes is created to read:

20 139.75 **(4n)** “Identification card” has the meaning given in s. 134.66 (1) (c).

21 **SECTION 66.** 139.75 (5s) of the statutes is created to read:

22 139.75 **(5s)** “Person” means any individual, sole proprietorship, partnership,
23 limited liability company, corporation, or association, or any owner of a single-owner
24 entity that is disregarded as a separate entity under ch. 71.

25 **SECTION 67.** 139.75 (7) of the statutes is amended to read:

1 139.75 (7) “Retail outlet” means each place of business from which tobacco
2 products are sold to consumers by a retailer.

3 ~~X~~
SECTION 68. 139.75 (8) of the statutes is amended to read:

4 139.75 (8) “Retailer” means ~~any person engaged in the business of selling~~
5 tobacco products to ultimate consumers has the meaning given in s. 134.66 (1) (g).

6 ~~X~~
SECTION 69. 139.76 (3) of the statutes is created to read:

7 139.76 (3) Except as provided in sub. (2), no person may possess tobacco
8 products in this state unless the tax imposed under sub. (1) is paid on such tobacco
9 products.

10 ~~X~~
SECTION 70. 139.78 (1m) of the statutes is created to read:

11 139.78 (1m) Except as provided in s. 139.76 (2), no person other than a
12 distributor with a valid permit under s. 139.79 may import into this state tobacco
13 products for which the tax imposed under s. 139.76 (1) has not been paid.

14 ~~X~~
SECTION 71. 139.79 (title) of the statutes is amended to read:

15 139.79 (title) **Permits; distributor; subjobber.**

16 ~~X~~
SECTION 72. 139.79 (1) of the statutes is amended to read:

17 139.79 (1) No person may engage in the business of a distributor, direct
18 marketer, or subjobber of tobacco products at any place of business unless that
19 person has filed an application for and obtained a permit from the department to
20 engage in that business at such place.

21 ~~X~~
SECTION 73. 139.79 (2) of the statutes is amended to read:

22 139.79 (2) Section 139.34 (1) ~~(b)~~ (c) to (f), (4) and (9) applies to the permits under
23 this section.

24 ~~X~~
SECTION 74. 139.795 of the statutes is created to read:

1 **139.795 Direct marketing. (1)** (a) No person may sell tobacco products by
2 direct marketing to consumers in this state as a direct marketer or solicit sales of
3 tobacco products to consumers in this state by direct marketing unless the person has
4 obtained a permit from the department to make such sales or solicitations. The
5 person shall file an application for a permit under this subsection with the
6 department, in the manner prescribed by the department.

7 (b) No person may be issued a permit under this subsection unless the person
8 holds a valid distributor's permit under s. 139.79. Section 139.34 (1) (c) to (f), (4), and
9 (9), as it applies to permits issued under s. 139.34, applies to permits issued under
10 this subsection.

11 (c) No person may be issued a permit under this subsection unless the person
12 certifies to the department, in the manner prescribed by the department, that the
13 person shall register with credit card and debit card companies; that the invoices and
14 all means of solicitation for all shipments of tobacco product sales from the person
15 shall bear the person's name and address and the permit number of the permit
16 ultimately issued under this subsection; and that the person shall provide the
17 department any information the department considers necessary to administer this
18 section.

19 **(2)** No person may sell tobacco products to consumers in this state by direct
20 marketing unless the tax imposed under s. 139.76, and under s. 77.52 or 77.53, has
21 been paid with regard to such products.

22 **(3)** No person may sell tobacco products to a consumer in this state by direct
23 marketing unless the person does all of the following:

24 (a) Verifies the consumer's identity and address and that the consumer is at
25 least 18 years of age by any of the following methods:

1 1. The person uses a database that includes information based on public
2 records.

3 2. The person receives from the consumer, at the time of purchase, a copy of an
4 identification card and verifies that the name specified on the identification card
5 matches the name of the consumer and that the birth date on the identification card
6 indicates that the consumer is at least 18 years of age.

7 3. The person uses a mechanism, other than a mechanism specified under subd.
8 1. or 2., that is approved by the department.

9 (b) Obtains from the consumer, at the time of purchase, a statement signed by
10 the consumer that confirms all of the following:

11 1. The consumer's name, address, and birth date.

12 2. That the consumer understands that no person who is under 18 years of age
13 may purchase or possess tobacco products or falsely represent his or her age for the
14 purpose of receiving tobacco products, as provided under s. 254.92.

15 3. That the consumer understands that any person who, for the purpose of
16 obtaining credit, goods, or services, intentionally uses, attempts to use, or possesses
17 with intent to use, any personal identifying information or personal identification
18 document of an individual, including a deceased individual, without the
19 authorization or consent of the individual and by representing that he or she is the
20 individual, that he or she is acting with the authorization or consent of the
21 individual, or that the information or document belongs to him or her, is guilty of a
22 Class H felony, as provided under s. 943.201.

23 (4) Any person who, without having a valid permit under sub. (1), sells or
24 solicits sales of tobacco products to consumers in this state by direct marketing shall
25 pay a penalty to the department of \$5,000 or an amount that is equal to 50 percent

1 of the tax due on the tobacco products the person sold, without having a valid permit
2 under sub. (1), to consumers in this state by direct marketing, whichever is greater.

3 (5) (a) No person may deliver a package of tobacco products sold by direct
4 marketing to a consumer in this state unless the person making the delivery receives
5 an identification card from the person receiving the package and verifies that the
6 person receiving the package is at least 18 years of age. If the person receiving the
7 package is not the person to whom the package is addressed, the person delivering
8 the package shall have the person receiving the package sign a statement that
9 affirms that the person to whom the package is addressed is at least 18 years of age.

10 (b) No person may deliver a package of tobacco products to a consumer in this
11 state unless the seller of the tobacco products provides proof to the person making
12 the delivery that the seller has complied with all requirements under this
13 subchapter. A seller shall have no course of action against any person who refuses
14 to deliver tobacco products as provided under this paragraph.

15 (6) All packages of tobacco products shipped to consumers in this state shall
16 be clearly labelled "TOBACCO PRODUCTS" on the outside of such packages.

17 (7) (a) Any nonresident or foreign direct marketer that has not registered to
18 do business in this state as a foreign corporation or business entity shall, as a
19 condition precedent to obtaining a permit under s. 139.79 (1), appoint and
20 continually engage the services of an agent in this state to act as agent for the service
21 of process on whom all processes, and any action or proceeding against it concerning
22 or arising out of the enforcement of this chapter, may be served in any manner
23 authorized by law. That service shall constitute legal and valid service of process on
24 the direct marketer. The direct marketer shall provide the name, address, phone

1 number, and proof of the appointment and availability of the agent to the
2 department.

3 (b) A direct marketer described under par. (a) shall provide notice to the
4 department no later than 30 calendar days before termination of the authority of an
5 agent under par. (a) and shall provide proof to the satisfaction of the department of
6 the appointment of a new agent no later than 5 calendar days before the termination
7 of an existing appointment. In the event an agent terminates an appointment, the
8 direct marketer shall notify the department of that termination no later than 5
9 calendar days after the termination and shall include proof to the satisfaction of the
10 department of the appointment of a new agent.

11 (c) The secretary of state is the agent in this state for the service of process of
12 any direct marketer who has not appointed and engaged an agent as provided under
13 par. (a), except that the secretary of state acting as the direct marketer's agent for
14 the service of process does not satisfy the requirements imposed by par. (a).

15 ^X
SECTION 75. 139.81 (1) of the statutes is amended to read:

16 139.81 (1) No person may sell ~~or take orders for~~ tobacco products for resale or
17 solicit sales of tobacco products in this state ~~for any manufacturer or permittee~~
18 unless the person has filed an application for and obtained a valid certificate under
19 s. 73.03 (50) and a salesperson's permit from the department. No ~~manufacturer or~~
20 permittee shall authorize any person to sell ~~or take orders for~~ tobacco products or
21 solicit sales of tobacco products in this state unless the person has filed an application
22 for and obtained a valid certificate under s. 73.03 (50) and a salesperson's permit.
23 No person may authorize the sale of tobacco products or the solicitation of sales of
24 tobacco products in this state unless the person has filed an application for and
25 obtained a valid certificate under s. 73.03 (50) and a valid permit under s. 139.79.

1 Each application for a salesperson's permit shall disclose the name and address of
2 the employer or the person for whom the salesperson is selling or soliciting and shall
3 remain effective only while the salesperson represents the named employer or
4 person. If the salesperson is thereafter employed by another ~~manufacturer or~~
5 ~~permittee person~~ the salesperson shall obtain a new salesperson's permit. Each
6 ~~manufacturer and permittee~~ The employer of any such salesperson shall notify the
7 department within 10 days after the resignation or dismissal of any the salesperson
8 holding a permit. X

9 **SECTION 76.** 139.81 (2) of the statutes is amended to read:

10 139.81 (2) Section 139.34 (1) (b) (c) to (e) applies to the permits under this
11 section. X

12 **SECTION 77.** 139.86 of the statutes is amended to read:

13 **139.86 Prosecutions by attorney general.** Upon request by the secretary
14 of revenue, the attorney general may represent this state or assist a district attorney
15 in prosecuting any case arising under this subchapter. The attorney general may
16 take any action necessary to enforce s. 139.795. X

17 **SECTION 78.** 139.87 of the statutes is created to read:

18 **139.87 Lists.** The department shall compile and maintain a list of direct
19 marketers who have complied with the requirements of s. 139.795 and a list of direct
20 marketers who the department knows have not complied with such requirements.
21 The department shall provide copies of the lists described under this section to the
22 attorney general and to each person who delivers tobacco products to consumers in
23 this state that are sold by direct marketing under s. 139.795. X

24 **SECTION 79.** 995.12 (5) (a) of the statutes is amended to read:

995.12 (5) (a) *License revocation and civil penalty.* Upon a determination that a distributor has violated sub. (2) (c), the department may revoke or suspend the license of the distributor in the manner provided under s. 139.44 (4) and (7). Each stamp affixed and each sale of cigarettes or offer or possession to sell cigarettes in violation of sub. (2) (c) shall constitute a separate violation. For each violation the department may also impose a forfeiture in an amount not to exceed the greater of 500% of the retail value of the cigarettes or \$5,000.

SECTION 9341. Initial applicability; Revenue.

(1) DIRECT MARKETING OF CIGARETTES AND TOBACCO PRODUCTS. The treatment of sections 77.61 (11), 100.20 (1n), 100.30 (2) (c) 1. b. and (L) (intro.) and 2., 134.65 (1), (1n), (1r), and (2) (a), 134.66 (2) (d) and (3m), 139.30 (4n), (7), and (8s), 139.32 (4), 139.321 (1) (intro.) and (a) 1., 139.34 (1) (a), (b), (c) 1., 1m., 2., 3., 4., 4m., 5., 6., and 7., and (cm), (4), (6), and (8), 139.345 (1) (a), (b), and (d), (3) (intro.) and (a) (intro.) and 2., (7) (a), (8), (9), (10), (11), and (12), 139.37 (1) (a), 139.40 (1) and (2), 139.44 (1m), (2), (3), (4), (5), (6), (6m), (7), and (13), 139.75 (2), (3g), (3r), (4) (a), (c), and (cm), (4n), (5s), (7), and (8), 139.76 (3), 139.78 (1m), 139.79 (title), (1), and (2), 139.795, 139.81 (1) and (2), 139.86, 139.87, and 995.12 (5) (a) of the statutes, the renumbering and amendment of section 134.65 (5) of the statutes, and the creation of section 134.65 (5) (b) of the statutes first apply to sales of cigarettes and tobacco products made on the effective date of this subsection.

(END)

D-note

STATE OF WISCONSIN - LEGISLATIVE REFERENCE BUREAU

LRB

Research (608-266-0341)

Library (608-266-7040)

Legal (608-266-3561)

LRB

LRB-1228/P/dn
JL: bjk

D-N

Date

Chad [^]_v

This draft is based on a similar budget
proposal from last session, ²⁰⁰⁷ LRB (07-0719/20)

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**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-1228/P1dn
JK:bjk:ph

January 7, 2009

Chad:

This draft is based on a similar budget proposal from last session, 2007 LRB-0719/2.

Joseph T. Kreye
Senior Legislative Attorney
Phone: (608) 266-2263
E-mail: joseph.kreye@legis.wisconsin.gov

2009-11 LRB Draft Review

Date:

01-20-09

LRB Number:

1228/P1

Reviewed by:

Tom Ourada/Chuck Zwettler/Chris Roys/Roger Johnson/Deb Klimke

Brief Description of LRB Draft:

2005 WI Act 25 provided for cigarette sales to consumers in the state by direct marketing, if the direct marketer meets specific requirements. The bill draft addresses a number of drafting errors and language concerns that have resulted in limiting the Department's enforcement authority over direct market sales of cigarettes and tobacco products.

Comments on Draft:

Indicate whether draft will accomplish intent, or if not, why not

With the revisions suggested below, the Department believes that the Draft will address several deficiencies in the current statute, strengthening the level of the Department's enforcement authority over direct marketers and ensuring greater compliance with the law. The revisions will also remove provisions that are preempted by federal law, reducing the threat of litigation.

Changes Needed & Why:

Include page and line references if appropriate. Example: page 2, line 4-5 – omit the phrase "with respect to a product under s.77.51 (3) (a)..." and replace with the phrase "all products used in a manner consistent with..."

- ✓ Page 2, lines 6 and 7 – omit the phrase "seller's permit as required by or is registered to collect, report, and remit use tax under this subchapter" and replace with the phrase "valid business tax registration certificate issued under s. 73.03 (50)."
- ✓ Page 2, line 9 and 10 – omit the phrase "seller's permit to that person or register that person to collect, report, and remit use tax." And replace with the phrase "valid business tax registration certificate issued under 73.03 (50)." The statutes have been revised to refer to "business tax registration" rather than "seller's permit" see s. 125.535 (3) (b) 1., as

created in 2008 WI Act 85. See also similar language on page 15, lines 9 and 10 of the draft.

- ✓ • Page 5, line 21 – omit the phrase “has not submitted proof as provided under s. 77.61 (11).” And replace with “holds a valid business tax registration certificate issued under s. 73.03 (50).” This change will make the language consistent with a comparable requirement enacted in Act 85.
- ✓ • Page 5, lines 18-20, and Page 9, lines 9-13 relating to the restrictions on who may hold s. 134.65 licenses and s. 139.795 permits, we suggest modifying the draft to make the language comparable to the permit and license restrictions currently found in s. 125.04 (5).
- ✓ • Page 10, line 22 – insert “under s. 139.34” after “has obtained a permit”.
- ✓ • Page 11, lines 4-6, and lines 16-18 – restore the deleted phrase, and make the following change: “No person may sell cigarettes as described under this section unless the person obtains a permit under par. (a) and certifies to the department, in the manner prescribed by the department, that the...”
- ✓ • Page 15, lines 7-8, and 12 – restore the phrase “take orders for cigarettes for resale” and add “or” after this phrase.
- ✓ • Page 15, line 24 – omit “employer” and inset “permittee”.
- ✓ • Page 16, lines 7-8 – insert “unless given to law enforcement officers, or sold to qualified buyers as authorized in s. 139.40 (2)”.
- ✓ • Page 16, lines 18-19 – omit the phrase “or give them to a charitable or penal institution for free distribution to patients or inmates.” The Department no longer gives seized cigarettes or alcohol beverages to charitable organizations or penal institutions. The seized product is used in criminal investigations or sold with proceeds going to the state treasury.
- ✓ • Page 16, line 22 – insert “or tax indicia” after “tax impression machine”. To protect state revenues of cigarette tax, which continue to increase significantly due to recent tax increases, the Department requires laws that will deter illegal activity. We propose to add “indicia” to insure that the statute applies to the Meyercord fusion stamps currently being used.
- ✓ • Page 17, line 7 – insert “134.65,” after “ss,”
- ✓ • Page 18, line 2 – insert “or license” after “permit”.
- ✓ • Page 19, line 11 – insert “or resale” after “sale”.
- ✓ • Page 20, line 12 – insert “, ship or transport” after “import”.
- ✓ • Page 21, lines 19-21- the language requiring a direct marketer to collect sales and use tax on purchases of cigarette and tobacco products is slightly different than the language enacted in 2007 Act 85 requiring a wine direct shipper to collect sales and use tax on direct wine shipments into the state. See: section 139.795 (2), Wis. Stats. The Department wants to point out that the language of the LRB draft is not the same as the language of Act 85 although the Department’s intent with regard to the collection of sales and use tax by cigarette direct marketers is the same as the intent with regard to collection of sales and use tax by wine

direct shippers. We want to make the drafter aware of this inconsistent language.

- In 2008, the U.S. Supreme Court, in the case of: *Rowe v. New Hampshire Motor Transport Association* ruled that federal law preempts certain provisions enacted by Maine regulating motor carrier delivery services. Maine adopted a law intended to prevent minors from receiving shipments of cigarettes. The law required that a state-licensed tobacco shipper must utilize a delivery company that provides a recipient verification service, confirming that the buyer is of legal age.
- Therefore provisions of existing law relating to age verification by carrier delivery services found in s. 139.345 (7) (a) and (b) and in SECTION 41 and SECTION 74 of the draft should be repealed and deleted, as such provisions are now preempted by federal law.
- ✓ Page 12, line 12 – repeal s. 139.345 (7) (a) and (b) of the statutes, and delete lines 13-20 and delete lines 3-14, page 23 of the draft.
- Page 25, lines 19-21 – delete the phrase “and a list of direct marketers who the department knows have not complied with such requirements.” And change “lists” to “list” in line 21. Due to the minimal compliance to the Federal Jenkins Act and non-regulation of internet businesses, it is impossible for the Department to provide the list of direct marketers who are non-compliant. In addition, if we did provide a list of “known” non-compliant direct marketers, it would provide consumers with the ability to check if a seller is providing data to the Department or not. In addition it results in disclosure of confidential audit accounts and audit procedures and policy.
- Consistent with this change, current law must also be modified. Delete the phrase “and a list of direct marketers who the department knows have not complied with such requirements.” in s. 139.46 of current law, and amend “lists” to “list”.
- Page 26, line 2 – restore the deleted phrase “or suspend”. The Department believes that if a distributor is in violation of the Master Settlement Agreement legislation to warrant revocation of their permit, then the immediate act of permit suspension is necessary in order to prevent any additional violations that may result in further cost or liability to the state or the distributor. A hearing for revocation of a permit requires lengthy administrative procedures that may result in delays and limit the Departments enforcement ability to cease sales of non-compliant product by the distributor.